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Attorneys for Timothy S. Kirby

**IN THE UNITED STATES DISTRICT COURT
FOR DISTRICT OF NEVADA**

FEDERAL DEPOSIT INSURANCE
CORPORATION, as Receiver of SILVER
STATE BANK.

Plaintiff.

VS.

COREY L. JOHNSON; DOUGLAS E. FRENCH; GARY A. GARDNER; and TIMOTHY S. KIRBY.

Defendants

Case No.: 2:12-CV-209-KJD-PAL

**DEFENDANTS' SUBMISSION
REGARDING COMPETING
PROPOSED ESI PROTOCOLS TO
GOVERN ELECTRONIC DISCOVERY**

(Expedited Consideration Requested)

24 Defendants Corey L. Johnson, Douglas E. French, Gary A. Gardner, and Timothy S.
25 Kirby (referred to collectively herein as the “Defendants”) hereby submit a proposed ESI
26 Protocol to govern electronic discovery in this matter. We believe the Federal Deposit
27 Insurance Corporation (“FDIC”) intends to file a competing protocol. The two ESI protocols
28 *differ in only one respect*: whether the Defendants must bear the burden of copying the

1 documents they identify in the FDIC's databases. Defendants respectfully request that for the
2 reasons stated herein the Court grant Defendants' proposed ESI protocol, attached hereto as
3 **Exhibit A.** In addition, given the upcoming depositions in this case, the Defendants
4 respectfully request the Court rule on the competing protocols as soon as possible.
5

MEMORANDUM OF POINTS AND AUTHORITIES

I. Background

7 The ESI protocols proposed by the FDIC and by the Defendants are similar in many
8 respects. Both require the Defendants to "collectively identify a reasonable set of search terms
9 to run across the processed" ESI. (*See* Defendants' Submission of Proposed ESI Protocol § 6,
10 attached as Exhibit A). The processed ESI includes a variety of databases, some of which have
11 been OCR'd by the FDIC and some of which have not and thus are not in full text searchable
12 form. (*Id.* § 5). After search terms are developed by the Defendants, the protocol requires that
13 the FDIC export the documents captured by the search to a Relativity database. (*Id.* § 6).
14 Defendants, who will pay a monthly collective fee of \$10 per gigabyte of ESI hosted on the
15 database, will be granted access to review the documents and designate those that are relevant.
16 The FDIC will then conduct a privilege review of the documents and produce the non-
17 privileged documents designated for delivery.
18

19 The protocols differ in one respect. The FDIC's proposal requires the Defendants to
20 pay a fee of six cents per page (\$0.06/page) for all documents produced and delivered by the
21 FDIC from the Relativity database. The Defendant's proposal requires that the FDIC bear the
22 production costs.

23 The ESI protocol was primarily drafted by the FDIC—the FDIC circulated the first
24 draft for the Defendants' consideration. And, initially, Defendants were concerned that the
25 protocol limited the FDIC's duty to identify relevant documents to those search terms
26 developed by the Defendants, who had limited knowledge of the databases collected and
27 processed by the FDIC. In addition, Defendants expressed concern over the hosting costs and
28 production costs being shifted to Defendants.

1 As the FDIC's initial disclosure included over 90,000 documents, it was agreed that the
2 ESI protocol would be tabled until the Defendants had an opportunity to review those
3 documents and, in so doing, gain a better sense of the universe of documents and what more
4 needed to be produced.

5 While the Defendants reviewed the haphazardly-produced documents, the FDIC has
6 noticed depositions in this matter for January 29, January 30 and February 7, 2013. Yet the
7 Defendants have not had access to the FDIC databases of documents.

8 In late December 2012 and early January 2013, with depositions scheduled and the
9 FDIC's refusal to produce ESI until the protocol was entered, the Defendants agreed to
10 shoulder the burden of developing search terms and conducting the review of relevant
11 documents. The costs, however, remained an obstacle to finalizing the protocol. Defendants
12 agreed to confer with their former employer's Director's and Officer's liability insurance
13 carrier (the "Carrier") to secure its agreement to cover the costs.

14 On January 15, 2013, Defendants informed counsel for the FDIC that the Carrier would
15 pay the hosting fee, but that it would not pay the six cents per page for production. Defendants
16 agreed with the Carrier's position that shifting the cost of production to the non-producing
17 Defendants was inappropriate in these circumstances. The FDIC suggested that the costs could
18 be avoided if they merely produced native files without bates numbering, an option that is
19 unreasonable because of the volume of documents in this matter and the complexity of the case.

20 Because the parties have been unable to reach agreement on this cost provision of the
21 ESI protocol, Defendants and the FDIC agreed to submit competing protocols to the Court.
22 The only difference in the competing protocols is in Paragraphs 6 and 7, where Defendants
23 have deleted the language requiring the non-producing parties to pay six cents per page
24 produced.

25 **II. Legal Authority**

26 The presumption under the Federal Rules of Civil Procedure is that the producing party
27 bears the expense of complying with discovery requests. *E.g., Oppenheimer Fund, Inc. v.*

1 *Sanders*, 437 U.S. 340, 358 (1978) (“Under [discovery] rules, the presumption is that the
 2 responding party must bear the expense of complying with discovery requests”); *Zubulake*
 3 *v. UBS Warburg LLC*, 217 F.R.D. 309 (S.D.N.Y. 2003) (“For data that is kept in an accessible
 4 format, the usual rules of discovery apply: the responding party should pay the costs of
 5 producing responsive data. A court should consider cost-shifting only when electronic data is
 6 relatively inaccessible, such as in backup tapes.”)(emphasis in original); *Platronics Inc. v. Aliph*
 7 *Inc.*, No. C 09–01714 WHA (LB), 2012 WL 6761576 (N.D. Cal. Oct. 23, 2012) (noting the
 8 “presumption that the producing party bears the cost of production”); *Mikron Industries, Inc. v.*
 9 *Hurd Windows & Doors, Inc.*, No. C07-532RSL, 2008 WL 1805727 at *2 (W.D. Wash. 2008)
 10 (noting that cost-shifting is not appropriate when ESI is reasonably accessible).

11 Indeed, the District Court of Nevada has held that a producing party is “liable for the
 12 costs associated with converting the documents into [the requesting party’s] requested format.”
 13 *LightGuard Systems, Inc. v. Spot Devises, Inc.*, 281 F.R.D. 593, 607 (D. Nev. 2012); *see also*
 14 *id.* at 597 (“With regard to [the] payment dispute, [the producing party] shall only be liable for
 15 the costs associated with converting the documents into [the requesting party’s] requested
 16 format.”). In *LightGuard*, the producing party had to pay the costs of collecting, processing,
 17 and converting documents into a format compatible with the requesting party’s data
 18 management software. *Id.* at 596.

19 The FDIC took the same unreasonable position last month in *FDIC v. Klein*, No. 1:12-
 20 CV-0896-RLV (N.D. Ga. Dec. 13, 2012). There, the Northern District of Georgia “require[d]
 21 the FDIC to respond to document requests and bear its own discovery costs,” and rejected the
 22 FDIC’s attempt to improperly shift the costs of production to the defendants. A copy of the
 23 *Klein* order and the prevailing ESI protocol in that case are collectively attached hereto as
 24 **Exhibit B.**

25 Unlike the FDIC’s proposed protocol, Defendants’ ESI Protocol appropriately provides
 26 that the FDIC must bear its own costs. This is a suit in which the FDIC seeks to recover in
 27 excess of \$86 million in damages. (Doc. 1 (Complaint) ¶ 10). The costs of production are
 28

1 minuscule in comparison. Defendants' proposal is fair, particularly in light of the costs that
 2 Defendants will incur developing search terms, reviewing the documents, and paying the
 3 hosting charge on Relativity.

4 **III. Conclusion**

5 Because there are upcoming depositions scheduled for January 29, January 30 and
 6 February 7, 2013, the Defendants respectfully request expedited consideration of this
 7 submission. Defendants further request that the Court grant their proposed ESI Protocol.

8 RESPECTFULLY SUBMITTED this 18th day of January, 2013.

9 /s/ Grace Rebling

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2 CERTIFICATE OF SERVICE
3

4 I hereby certify that on January 18, 2013 the attached document was electronically transmitted
5 to the Clerk of the Court using the CM/ECF System which will send notification of such filing
6 and transmittal of a Notice of Electronic Filing to all CM/ECF registrants.
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/s/J. Rial _____